Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

JOSEPH GABRIEL CASTELLO,

Petitioner,

vs.

WILLIAM DUNCAN, WARDEN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether petitioner's guilty plea was not a knowing and voluntary plea, where it is undisputed that nobody explained to illiterate and below average intelligence petitioner his rights and nobody read to him the rights he was waiving prior to him affixing his initials next to the "x" on the form in each box, and where he did not know what he was pleading guilty to, and the conviction by that plea constitutes a violation of petitioner's rights to a jury trial and/or to due process of law under the Sixth and Fourteenth Amendments, United States Constitution.

2. Whether petitioner was denied his right to effective assistance of counsel under the Sixth Amendment, United States Constitution, where the public defender accepted a waiver of rights form with his initials without ascertaining that petitioner could read, and without explaining the elements of the charge or defenses to the charge.

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PETITION FOR WRIT OF CERTIORARI

Petitioner JOSEPH CASTELLO hereby petitions for a writ of certiorari to the U.S. Court of Appeal for the Ninth Circuit, to review its decision filed on November 13, 2001, affirming petitioner's conviction of attempted murder with a gun enhancement, resulting in a sentence of 9 years on the attempted murder and four consecutive years for the firearm use enhancement. (California Penal Code, sections 664/187, subdivision (a) and 12022.5, subdivision (a)).

I. OPINION BELOW

The order of the Ninth Circuit Court of Appeal of November 13, 2001, denying a certificate of appealability in this case, is attached in the Appendix.

II. JURISDICTION

Petitioner raised the issues presented herein in a state writ of habeas corpus. The trial court granted an evidentiary hearing, and after the hearing, the issues were rejected on the merits in an opinion filed on May 14, 1999. This issue was then presented to the California Court of Appeal, which was summarily denied on September 28, 1999. The issue was raised in the California Supreme Court in a petition for writ of habeas corpus, which was summarily denied on January 25, 2000.

Petitioner then filed a petition for writ of federal habeas corpus in the U.S. District Court, under 28 U.S.C. § 2254. A magistrate's report and recommendation was filed on June 5, 2001, recommending that the petition be

denied. The U.S. District Court judge adopted the recommendation in an order entered on June 27, 2001. Petitioner filed a Notice of Appeal and an Application for a Certificate of Appealability, which was denied by the District Court in an order entered on July 16, 2001. Petitioner filed another Application for Certificate of Appealability with the U.S. Circuit Court of Appeal for the Ninth Circuit, which was denied by order of November 13, 2001.

Petitioner respectfully invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 2241 to review denials of applications for certificate of appealability by a circuit judge or a court of appeals panel; *Hohn v. United States*, 524 U.S. 236, 118 S. Ct. 1969, 141 L. Ed. 2d 242 (1998).

III. CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."

United States Constitution, Amendment XIV:

"No State shall . . . deprive any person of life, liberty, or property, without due process of law."

IV. STATEMENT OF THE CASE

A. Proceedings

On August 29, 1996, Joseph Castello was charged in Riverside County, California, by information with count one, attempted murder of Deputy Dave Sanches in violation of Penal Code §§ 664/187. It was further alleged that

in the commission of count one, petitioner personally used a firearm, to wit, a shotgun, within the meaning of Penal Code §§ 12022.5(a) and 1192.7(c)(8).

Petitioner was charged in count two with discharging a firearm at an inhabited dwelling, in violation of Penal Code § 246. In count three, petitioner was charged with being a felon in possession of a firearm in violation of Penal Code § 12021(a)(1).

At the arraignment on August 28, 1996, the formal reading of the charge was waived. (Plea, page 2). Petitioner pleaded guilty to count one, with a sentence agreement of 13 years. He was sentenced immediately to 9 years on count one, plus 4 years for the gun. (Plea, page 3). However, during this procedure, nobody told the petitioner what he was pleading guilty to, that it was a specific intent crime, and nobody explained petitioner's right against self-incrimination, his right to trial by jury, and his right to confront his accusers. Petitioner, who was illiterate and of below average intelligence, was handed a waiver form and told to place his initials in each box.

The court asked Petitioner if he understood his rights, and the petitioner answered yes. Then the court said:

THE COURT: It appears that you wish to plead guilty to Count I, is that correct?

THE DEFENDANT: Yes.

THE COURT: And you're also admitting the allegation pursuant to Penal Code section 12022.5(a), is that correct?

THE DEFENDANT: Yes.

THE COURT: And do you understand that the maximum punishment you could receive for that offense is 19 years in the state prison?

THE DEFENDANT: Yes.

THE COURT: Its been agreed probation would be denied and you would serve 13 years in the state prison, less any credit?

THE DEFENDANT: Yes.

THE COURT: Has anything else been promised to you?

THE DEFENDANT: No.

THE COURT: Has anyone threatened you or anyone close to you to force you to change your plea?

THE DEFENDANT: No.

THE COURT: At this time, are you giving up your rights in order to enter your guilty plea?

THE DEFENDANT: Yes.

THE COURT: All right, to a violation, an attempted violation of Penal Code 187 as charged in count I, how do you plead? THE DEFENDANT: Guilty.

THE COURT: And to the allegation pursuant to Penal Code section 12022.5, that you used a firearm in the commission of that offense, are you admitting or denying that?

THE DEFENDANT: Admitting it.

THE COURT: And are you pleading guilty to Count I as well as admitting the allegation of being of using a firearm because you want to plead guilty to the offense?

THE DEFENDANT: Yes.

The Court then sentenced petitioner. (Plea)

B. The Underlying Facts

Joseph Castello grew up on the Soboba Indian Reservation, and did not learn to read or write. He was of below average intelligence, with an I.Q. of 88, and a severe alcoholic. On June 9, 1996, he drank all day. He picked up his .410 bolt action shotgun and a box of birdshot from his father's house and headed for home. On the way home he took some shots at cans lying by the roadside. In a drunken stupor, he staggered toward his nearby house. A witness saw him stumbling and staggering and at one point he almost fell over. Petitioner fired some shots in the general direction of the Salgado house. Robert Salgado called the police to say that Joe Castello had fired at his house. Deputies drove out to find petitioner.

They found a very drunken petitioner, shotgun over the shoulder, a short distance from the path leading up the hill to his house. They stopped their cars behind petitioner and ordered him to put down his gun. Instead he turned and headed up the steep hill toward his house. When he reached the top of the hill, deputies reported that he turned and fired a shot at them. Other civilian witnesses said he did not shoot at them. The deputies opened fire, petitioner was shot and remained in a coma

for 33 days. When he woke up, he was charged with attempted murder.

His first encounter in court was the preliminary hearing. He was medicated on morphine.

His next court appearance was the arraignment. The public defender who represented all indigent defendants that day could not remember him. She testified that in a busy arraignment court, they bring in a row of defendants in leg-irons all chained together and seat them in the jury box. She goes over and sits next to them, and discusses their cases, and tells them what the District Attorney's offer is. (Evidentiary hearing, 31-33). If a defendant agrees to plead guilty, she brings a waiver form, fills it out, tells the defendant it is a waiver form, and tells him to read it, initial it (E.H. p. 37). She then asks the defendant if he has any questions about the rights he is waiving. (E.H. p. 38). She does not ask them if they can read. (E.H. p. 38). The rights they are waiving are not explained, so if they cannot read, they never know what they are initialing. (E.H. p. 38).

Attempted murder is a specific intent crime in California, so intoxication would be a defense. At the evidentiary hearing, the public defender admitted that she could not testify that she talked to petitioner about all the defenses to the charge. (E.H. p. 34). The state court judge made a finding that the public defender did not explain the defense of intoxication to the defendant, but that he did not find that conduct equaled ineffective assistance of counsel. (E.H. p. 96).

Petitioner did not tell the public defender that he was illiterate. She gave him a waiver form and told him to

read and sign it. The court took a plea to attempted murder without anyone reading petitioner his *Boykin* rights, and without a factual basis for the plea.

In this case, nobody told the petitioner the consequences of the plea, nobody told him he was pleading to murder (the court said "You are pleading to Count One, is that correct). The petitioner testified that he thought he was pleading guilty to shooting at a house (E.H. p. 74). He testified the public defender told him 13 years was a good deal, so he pleaded guilty. (E.H. p. 75.) Nobody told the Petitioner what Count One was, nobody told petitioner what the maximum exposure for Count One was, nobody made a factual basis for Count One. Nobody told the petitioner that he had defenses to the charge.

This Petition is Timely

This is a timely petition for writ of certiorari to the U.S. Court of Appeal for the Ninth Circuit. It has been filed within ninety (90) days of the November 13, 2001, order of the U.S. Court of Appeal for the Ninth Circuit, denying the Certificate of Appealability.

V. REASONS FOR GRANTING THE WRIT IN THIS CASE

This case should be accepted and a ruling issued on the merits to determine under what circumstances a guilty plea is constitutional, where neither the judge nor the trial counsel explain to the illiterate and mentally challenged defendant the rights he is waiving. A review

of U.S. Supreme Court cases in this area will be incomplete unless this Court considers this case. State courts need guidance from this Court, a consistent rule to follow when accepting a guilty plea from illiterate, retarded, or mentally challenged individuals. This issue was touched upon in 1976, when this Court held in *Henderson v. Morgan*, 426 U.S. 637, 96 S. Ct. 2253, 49 L. Ed. 2d 108, that a plea of guilty may be involuntary either because the defendant does not understand the nature of the constitutional protections he is waiving, or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt and, without adequate notice of the charge against him, proof that he in fact understood the charge, the plea cannot be voluntary in this latter sense.

More recently, in *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), this Court has suggested that what may be constitutional for a normal defendant might not be constitutional for a retarded defendant.

This case should be accepted and a ruling issued on the merits to determine whether *Henderson v. Morgan*, 426 U.S. 637, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976) has any continued vitality. Petitioner, who is mentally challenged, was not told what he was pleading guilty to, or that it was a specific intent crime. He was also not informed that intoxication is a defense to a specific intent crime.

This case should be accepted and a ruling issued on the merits to determine the constitutionality of a waiver, where the public defender does not read the rights to an

illiterate defendant, but only tells him to initial the boxes on the form.

Where, as here, there are no safeguards to guarantee a voluntary plea, we have extraordinary circumstances that demand Supreme Court review.

A. PLEA WAS NOT KNOWING OR VOLUNTARY

A defendant has a constitutional right to due process. U.S. Const., Amend. XIV. A guilty plea is only valid if it is voluntarily and knowingly made. An appellate court may not presume a waiver from a silent record. *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). The California Supreme Court construed *Boykin v. Alabama*, supra, to require the record to reveal "on its face" that before accepting a plea of guilty, the trial court must expressly advise and obtain a waiver from the defendant of the right to a jury trial, to confront witnesses, and against self-incrimination. *In re Tahl*, 1 Cal. 3d 122, 460 P.2d 839 (1969).

In this case, the waiver was obtained by the illiterate petitioner affixing his initials on a waiver form. Nobody read him the form, or told him what he was initialing.

Petitioner Castello has an I.Q. of 88 and he is illiterate. (Declaration of James Dirks). A cranial CT scan of petitioner from Petitioner's post-arrest hospitalization showed mild cerebral atrophy (Declaration of James Dirks). Petitioner had been an alcoholic since age 14. (Declaration of Petitioner).

Bullets fired by the police put petitioner in a coma for 33 days. He was then brought to court in leg-irons and chains.

It is undisputed that Petitioner did not tell the Public Defender that he was illiterate. She handed him a waiver form, to waive his *Boykin* rights, and told him to read it and sign it. He put his initials in each blank space. He signed his name where she had affixed an "x". (Waiver form).

In this case, nobody told the petitioner the consequences of the plea, nobody told him he was pleading to murder (the court said "You are pleading to Count One, is that correct). The petitioner testified that he thought he was pleading guilty to shooting at a house (E.H. p. 74). He testified the public defender told him 13 years was a good deal, so he pleaded guilty. (E.H. p. 75.) Nobody told the Petitioner what Count One was, nobody told petitioner what the maximum exposure for Count One was, nobody made a factual basis for Count One. Nobody told the petitioner that he had defenses to the charge.

1. Prejudice

Petitioner would not have pleaded guilty if he had been properly advised. First, he did not know he was pleading to attempted murder, he thought he was pleading to shooting at a house. Secondly, he was not informed that an element of attempted murder is the specific intent to kill. Third, he was not informed that intoxication can be a defense to a specific intent crime. Fourth, he was not informed of the rights he was waiving. (E.H. 54-55).

2. The Trial Court's Ruling After Evidentiary Hearing

In this case, the state court made a finding that the public defender handed the Petitioner the waiver form and did not ascertain if he could read. (E.H. 94). The state court also made a finding that Petitioner has limited reading abilities and his intelligence and ability to perceive and comprehend things is well below average. (E.H. p. 94). These are findings of fact which deserve deference. However, the state court concluded that because Petitioner had pleaded guilty before, he understood his rights. This is a mixed question of fact and law, that does not deserve the presumption of correctness. See *Thompson v. Keohane*, 516 U.S. 99, 116 S. Ct. 457, 113 L. Ed. 2d 383 (1995).

The state court found that the attorney did not advise him of his rights, but handed him a form, told him to read and initial it. (E.H. p. 94). The court used other factors, the defendant's prior advisement, to get around the failure of this attorney's duty to advise. The judge found that this mentally challenged defendant understood his *Boykin* rights, even though nobody explained them to him. (E.H. 95). The court gave weight to the fact that the petitioner had his rights explained to him on other occasions, and he was present at the preliminary hearing. (E.H. p. 95). The court ignored the evidence that petitioner was on morphine at the time of the preliminary hearing, and could not remember what happened. (E.H. p. 65). The court clearly erred. In this case, the state court made a finding that there was no extensive explanation, if any, with respect to the intoxication issue or other possible defenses. (E.H. p. 96).

The issue of whether Petitioner was denied the effective assistance of counsel is also a mixed question of law and fact, and therefore is a matter for independent federal determination. In this case, the state court's application of federal law was clearly erroneous. *Van Tran v. Lindsey*, 212 F.3d 1143, 1153 (9th Cir. 2000). The state court's finding that the "petitioner knew darn well what was going on" because he indicated he wanted to reach a plea bargain is not supported by reason or the facts. The Petitioner is child-like in his understanding and demeanor. The state court's factual finding that Petitioner had been to court and had his rights explained to him deserves deference, but the conclusion that because someone explained something before, he will understand it now is clearly erroneous.

The state court also relied on the fact that Petitioner had been present at the preliminary hearing, where the officers testified to their version of the events, and Petitioner had a competent public defender cross-examine. The state court failed to note that at the time of the preliminary hearing, Petitioner was on morphine. (E.H. p. 65). The fact that he was on morphine, combined with an I.Q. of 88, and the fact that he had been shot into a coma for 33 days, and dragged to court in leg irons, shows that the state court's conclusion that Petitioner understood his rights and the charges was clearly erroneous.

3. Magistrate's Ruling Which Was Adopted By U.S. District Judge

It is clear that the magistrate thought this was a close case, when holding, "Although the evidence arguably

could have yielded a different conclusion, Judge Theirbach's conclusion was not unreasonable . . . " (R and R, p. 9).

The magistrate held that the fact that there was no factual basis for the guilty plea cannot justify habeas relief, because, absent special circumstances not here present, the federal constitution does not impose on a state court the duty to establish on the record the factual basis for the guilty plea. (R and R, p. 4, fn. 4). In *Henderson v. Morgan*, this Court found a guilty plea involuntary where neither trial counsel nor the trial court explained to the accused that intent to cause the death of the victim was an element of the crime. The fact that the accused had an unusually low mental capacity was a factor in this Court's decision that the plea was involuntary.

In *Henderson*, the defendant's I.Q. was reported by examiners as in the range between 68 and 72. Two concededly competent lawyers were appointed to represent him. The indictment that he willfully stabbed his victim was read in open court. Defense counsel held a series of conferences with the prosecutor, the defendant, and his family. Eventually, defendant entered a guilty plea to second degree murder, and in direct colloquy with the judge the defendant stated that he understood he was accused of killing the victim, that he was waiving his right to trial, and that he would be sent to prison. There was no discussion of the elements of second degree murder, and no reference to the requirement of intent to cause death of the victim.

At the evidentiary hearing, the defendant testified that if he had known that an intent to cause death was an element, he would not have pleaded guilty.

In *Henderson*, this Court assumed that the prosecutor had overwhelming evidence of guilt, that defense counsel was competent, and the wisdom of their advice to accept the plea bargain. However, this Court held that such a plea cannot support a judgment of guilt unless it is voluntary in the constitutional sense.

In the case at bar, the rights were never read to or by the illiterate petitioner. The in-court statements do not reflect that the petitioner knew what he was waiving. The judge asked the defendant if he understood his rights, but nobody had told him what they were. The judge did not read the rights. (E.H. p. 19-20).

In this case, the public defender did not determine that Petitioner was illiterate, and did not read the rights to him. Therefore, the finding that Petitioner's plea was knowing and voluntary, and that he waived his *Boykin* rights, was an unreasonable and clearly erroneous finding. The public defender failed to investigate or explain to petitioner that intoxication was a defense to the charge of attempted murder. A guilty plea cannot be knowing and voluntary if the petitioner is not aware of the charges or defenses. The conclusion that Petitioner would have pled guilty anyway, if he understood the defenses and his rights, is clearly erroneous.

4. Voluntary And Intelligent Plea

A conviction is invalid if the defendant pleads guilty without waiving his *Boykin* rights. These waivers need not be explicit or express if the plea is voluntary and intelligent. However, in this case, the Petitioner has an I.Q. of 88. In *U.S. v. Carroll*, 932 F.2d 823, 824 (9th Cir. 1991), the defendant challenged four prior state convictions which affected his federal sentence. In three of the cases, defendant had waived his rights on the record. In the fourth, the record was silent, and the court reversed that conviction.

Our case is similar. Although there is a waiver form that Petitioner initialed, the public defender did not determine that Petitioner was illiterate, and did not read the rights to him. Therefore, the finding that Petitioner's plea was knowing and voluntary, and that he waived his *Boykin* rights, was an unreasonable and clearly erroneous finding.

Under the "unreasonable application clause, a federal habeas court may grant a writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 1523, 146 L. Ed. 2d 389 (2000).

That is precisely the case here. The state court held that the fact that the Public Defender merely handed Petitioner the waiver form and told him to read it and initial it if he understood it does not make the plea involuntary. The court held that petitioner clearly has limited abilities to read and his intelligence is way below average. (E.H. p. 94). The factual findings made by the

court show that the waiver was not knowing or voluntary. The conclusions reached by the judge were unreasonable.

II. PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL

This case should be accepted and a ruling issued on the merits to determine the propriety of trial counsel handing the Advice of Rights form to ten defendants chained together and telling them to read it and initial it, without asking them if they can read. This case should also be accepted and a ruling issued on the merits to determine the propriety of encouraging a guilty plea without discussing the defense of intoxication when it was clear from the police reports that the defendant was very drunk. This case should be accepted and a ruling issued on the merits to determine the propriety of encouraging a guilty plea without ascertaining if the defendant understands the specific intent to kill, when that is an element of the crime to which he is pleading guilty.

A criminal defendant is guaranteed the right to effective assistance of counsel by both the federal and state constitutions. U.S. Const., Amend. VI, XIV; Cal. Const., art I, § 15: *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *McMann v. Richardson*, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970); *People v. Ledesma*, 43 Cal. 3d 171, 729 P.2d 839 (1987). In order to prevail, petitioner must show that counsel's performance was deficient because his representation fell below an objective standard of reasonableness under prevailing

professional norms, and that there is a reasonable probability that the deficient performance prejudiced his case. In this case, counsel failed to investigate two meritorious defenses: (1) that petitioner was too drunk to form the specific intent to murder; and (2) there were witnesses that petitioner did not shoot at the police officers at all. In this case, counsel also failed to ascertain that petitioner could read, and counsel failed to make sure that petitioner understood his rights and the plea bargain.

Effective counsel would have explored defenses. If counsel had investigated and discussed the case with petitioner, petitioner would not have pled guilty to attempted murder.

Effective counsel would have discussed the rights with the defendant. Effective counsel would have made sure the defendant knew the elements of the crime to which he was pleading.

Failure to investigate the defenses or discuss them at all with petitioner fell below the standard of professional competence required of criminal lawyers. Failure to inform the petitioner of his rights, and failure to ascertain if he could read also fell below the standard. *Strickland v. Washington*, supra; U.S. Const., Amend. VI. But for the ineffective assistance of counsel, petitioner would not have entered the plea of guilty to a charge to which he was factually innocent.

The state superior court disposed of the issue saying that although the court was concerned since the public defender merely handed the waiver form to petitioner and told him to read it and initial it without asking if he

could read, that alone does not show ineffective assistance of counsel. (EH p. 74). The state court found it significant that petitioner had entered a guilty plea on another occasion. The court also made a finding of fact that the public defender did not discuss defenses to the charge with petitioner, but did not find that was ineffective. (EH p.76).

This is an unreasonable application of the principles to the facts of the prisoner's case. *Williams v. Taylor*, supra, 120 S. Ct. at 1523. The trial attorney had a duty to make sure the defendant understood the constitutional rights he was waiving, and she failed to do so. The judge's ruling that it didn't matter is clear error. *Van Tran v. Lindsey*, 212 F.3d 1143 (9th Cir. 2000).

The trial judge found that there was no extensive explanation, if any, with respect to the intoxication issue or other possible defenses. (E.H. p. 96). The judge held that this does not equate with ineffective assistance. This is clear error. In order for a guilty plea to be knowing and voluntary, a defendant must be told of the possible defenses to the charge, especially when the defendant tells his attorneys he was drunk and can't remember what happened. In this case, the defendant would not have pled guilty to attempted murder if he had understood that the crime required specific intent, and intoxication is a defense.

Regardless of what a sentence would be, the defendant is the one who has the right to plead guilty or go to trial. The attorney has the duty to explain all his rights and the possible defenses to the charge. Only then can his guilty plea be knowing and voluntary. In this case, the

rights and defenses were not explained, and Petitioner would not have pled guilty if he had understood.

A criminal defendant is guaranteed the right to effective assistance of counsel by both the federal and state constitutions. U.S. Const., Amend. VI, XIV; Cal. Const., art I, § 15: *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 647 (1984). The judge's ruling that petitioner was not denied effective assistance of counsel is an unreasonable application of the principles to the facts of the prisoner's case. *Williams v. Taylor*, supra, 120 S. Ct. at 1523. The judge's ruling is clear error. *Van Tran v. Lindsey*, 212 F.3d 1143 (9th Cir. 2000).

The District Court concluded that Petitioner would have pled guilty even if his attorney had explained the intoxication defense to attempted murder. (Report, page 13, line 12). However, the Petitioner's position is that he did not shoot at the police, and only pled guilty when threatened with a life sentence, and not told about the intoxication defense. In this case, the police shot Petitioner full of holes and put him in a coma for 33 days. Afterwards, they reported that he had shot at them first. It is not unheard of that police officers, after shooting someone to death or near death, would falsely claim that the defendant shot first.

The state court's holding that the Public Defender did not read Petitioner his rights and his finding that no explanation was given of the intoxication defense are facts that are presumed correct. However, the conclusion Petitioner would have pleaded guilty anyway, if he understood the defenses and his rights, is clearly erroneous.

CONCLUSION

Petitioner has a federally protected right to due process and effective assistance of counsel. A guilty plea is only valid if it is knowing and voluntary, and not a product of ineffective assistance of counsel. A standard of review must not be applied in a way that federal rights cannot be protected by federal review. In this case, the state court identified the correct governing legal principles but unreasonably applied the principle to the facts of the case. *Williams v. Taylor*, 529 U.S. 362 (2000). This Court should grant the writ and reverse Petitioner's conviction.

PRAYER FOR RELIEF

Petitioner respectfully requests that this petition for certiorari be granted and that this Court vacate and reverse the decision of the California courts.

Dated: February 11, 2002.

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On Petition For Writ Of Certiorari
To The United States Court Of Appeal
For The Ninth Circuit

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH GABRIEL CASTELLO, Petitioner-Appellant, v. WILLIAM DUNCAN, Warden, et al., Respondents-Appellees.	No. 01-56168 D.C. No. CV-01-00047-VAP Central District of California (Los Angeles) **ORDER** (Filed Nov. 13, 2001)

Before: **KLEINFELD** and **FISHER,** Circuit Judges.

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2). All outstanding motions are denied.

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S082985

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

IN RE JOSEPH GABRIEL CASTELLO

ON

HABEAS CORPUS

(Filed Jan. 25, 2000)

Petition for writ of habeas corpus is DENIED.

/s/ George
Chief Justice

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSEPH GABRIEL CASTELLO, Petitioner, v. WILLIAM DUNCAN, Warden, Respondent.	NO. ED CV 01-0047-VAP(E) REVISED REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (Filed Jun. 5, 2001)

This Report and Recommendation is submitted to the Honorable Virginia A. Phillips, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 194 of the United States District Court for the Central District of California.

PROCEEDINGS

On January 24, 2001, Petitioner filed a "Petition For Writ of Habeas Corpus by a Person in State Custody." On April 20, 2001, Respondent filed an Answer and a "Memorandum of Points and Authorities in Support of Answer, etc." ("Mem."). Petitioner filed a Traverse on May 3, 2001.

BACKGROUND AND SUMMARY OF PETITIONER'S CONTENTIONS

An Information charged Petitioner with attempted murder, discharging a firearm at an inhabited dwelling house and being a felon in possession of a firearm

("Motion to Dismiss, etc.," filed February 20, 2001 at 8-9). Two Sheriff's deputies were prepared to testify they saw Petitioner aim and fire a shotgun at the deputies ("Motion to Dismiss, etc." at 76-79). Under the Information, Petitioner faced a possible prison term of life plus 17 years (Mem., Ex. E at 51).

Prior to his August 28, 1996 arraignment, Petitioner expressed a desire to negotiate a disposition of the case (Mem., Ex. E at 43-44, 95). At the arraignment, upon the recommendation of his counsel, Petitioner accepted a plea bargain whereunder he pled guilty to attempted murder, admitted a firearm use allegation and received a sentence of 13 years (Mem., Ex. C).

Petitioner challenges his conviction, arguing: (1) his plea allegedly was not knowing and voluntary; and (2) he allegedly was denied the effective assistance of counsel.

STANDARD OF REVIEW

The Petition was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, signed by the President on April 24, 1996 ("AEDPA"). Therefore, AEDPA's provisions apply. *See Lindh v. Murphy*, 521 U.S. 320, 336-37 (1997); *Jeffries v. Wood*, 114 F.3d 1484, 1499 (9th Cir.) (en banc), *cert. denied*, 522 U.S. 1008 (1997). AEDPA provides, in relevant part, that an application for writ of habeas corpus on behalf of a person in state custody shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of,

clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362 (2000); *Van Tran v. Lindsey*, 212 F.3d 1143, 1149 (9th Cir.), *cert. denied*, 121 S. Ct. 340 (2000).

DISCUSSION

For the reasons discussed herein,[1] the Petition should be denied and dismissed with prejudice.[2]

I. Claim that Plea Was Not Knowing and Voluntary

Petitioner, admittedly competent[3], but assertedly illiterate and of below-average intelligence, argues his guilty plea was not knowing and voluntary.[4] During state

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[1] This Court assumes, *arguendo*, the timeliness of the present Petition. *See Calderon v. United States Dist. Ct. (Beeler)*, 128 F.3d 1283, 1286 n.2 (9th Cir. 1997), *cert. denied*, 522 U.S. 1099 (1998), *overruled on other grounds, Calderon v. United States Dist. Ct. (Kelly)*, 163 F.3d 530, 539-40 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999).

[2] The Court has considered and rejected each of Petitioner's claims. The Court discusses what appear to be Petitioner's principal claims herein.

[3] "Petitioner's Opposition to Motion to Dismiss," filed March 19, 2001, at a 8 ("the petitioner is competent").

[4] Petitioner also argues "there was no factual basis on the record for the plea" (Petition at 60). This argument cannot justify habeas relief because, absent special circumstances not here present, the federal constitution does not impose on a state

habeas corpus proceedings, following a May 14, 1999 evidentiary hearing, Superior Court Judge Christian F. Thierbach, rejected this claim (Mem. Ex. E). Under the applicable standards of review, this federal court should not disturb Judge Thierbach's ruling.

A conviction is constitutionally invalid if the defendant pleads guilty without waiving: (1) the right to a jury trial; (2) the right to confront adverse witnesses; and (3) the privilege against self-incrimination. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). However, these waivers need not be explicit or express, if the plea is voluntary and intelligent. *See United States v. Carroll*, 932 F.2d 823, 824 (9th Cir. 1991), *superseded by statute on other grounds as stated in United–States v. Avery*, 773 F. Supp. 1400 (D. Or. 1991), *aff'd*, 15 F.3d 816, *cert. denied*, 511 U.S. 1148 (1994); *United States v. Pricepaul*, 540 F.2d 417, 425 (9th Cir. 1976), *Abrogation on other grounds recognized by United States v. Mulloy*, 3 F.3d 1337 (9th Cir. 1993) ("[T[he government need prove only that [appellant's] prior state plea was voluntary and intelligent . . . and need not show that each of the three Boykin rights was expressly brought to [appellant's] attention and waived by him."); *see also United States v. Rubalcaba*, 811 F.2d 491, 493 (9th Cir.), *cert. denied*, 484 U.S. 832 (1987) ("This court has stated that 'Boykin

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court the duty to establish on the record the factual basis for a guilty plea. *See Rodriguez v. Ricketts*, 777 F.2d 527, 528 (9th Cir. 1985); *see also United States v. Newman*, 912 F.2d 1119, 1123 (9th Cir. 1990); *see generally* 28 U.S.C. § 2254(a) (federal habeas corpus relief may be granted "only on the ground that [petitioner] is in custody in violation of the Constitution or laws or treaties of the United States"); *accord Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

does not require specific articulation of the rights being waived by the guilty plea.' ") (quoting *United States v. Freed*, 703 F.2d 394, 395 (9th Cir., *cert. denied*, 464 U.S. 839 (1983)); *Rodriguez v. Ricketts*, 798 F.2d 1250, 1254 (9th Cir. 1986), *cert. denied*, 479 U.S. 1057 (1987) ("Boykin does not require the State court to enumerate all of the rights a defendant waives as long as the record indicates that the plea was entered voluntarily and understandingly").

Under both pre-AEDPA and post-AEDPA law, a state court's findings on questions of fact carry a presumption of correctness. *See Sumner v. Mata*, 455 U.S. 591, 597 (1982); 28 U.S.C. § 2254(e)(1). Under AEDPA, a habeas petitioner bears the burden of rebutting the presumption of correctness by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). State court factual findings underpinning a determination that a guilty plea was knowing and voluntary are presumed correct, absent clear and convincing evidence to rebut the presumption. *See Parke v. Raley*, 506 U.S. 20, 35 (1992); *Chacon v. Wood*, 36 F.3d 1459, 1465 (9th Cir. 1994); *Banta v. Ignacio*, 28 F.Supp. 2d 1182, 1187 (D. Nev. 1998) (findings that defendant entered into guilty plea "knowingly" and understood consequences of guilty plea constitute factual findings entitled to deference on habeas review). Implicit as well as explicit findings of fact may be accorded a presumption of correctness on habeas review. *See Knaubert v. Goldsmith*, 791 F.2d 722, 727 (9th Cir.), *cert. denied*, 479 U.S. 867 (1986).

At the evidentiary hearing in state court, Petitioner testified that he had been arrested numerous times prior to his arrest in the present case (Mem., Ex. E at 79). On each such prior occasion, he had been taken to court and the judge had explained Petitioner's rights to him. *Id.* On

those prior occasions, public defenders appointed to represent Petitioner read to Petitioner the rights Petitioner would be waiving when he pled guilty (*Id.* at 59-61, 80, 82-83, 85-86. During the plea proceedings in the present case, Petitioner initialed and signed an "advisement of rights" form (Answer, Ex. B). This form recited, *inter alia*, the right to a jury trial, the right to confront adverse witnesses and the privilege against self-incrimination. *Id.* At the plea hearing, Petitioner stated he understood his rights (Mem. Ex. C at 19).

At the evidentiary hearing, Petitioner's former counsel, Toni Healy, testified she was an experienced public defender (Mem., Ex. E at 27-28). Healy did not recall representing Petitioner in 1996, but testified to her usual procedures in arraignment court (*Id.* at 28). Before she came into arraignment court, she would review the file, which would contain the police reports, investigation reports, discovery from the prosecutor, the preliminary hearing transcript, any correspondence, and the preliminary hearing evaluation form from the attorney who had handled the case up until that point in time (*Id.* at 29-31). Healy would tell the defendant the nature of the charges and the maximum punishment the defendant faced (*Id.* at 34-35). She would discuss the case with the defendant (*Id.* at 31). Healy would discuss the merits of trial versus pleading, the strength of the case, the defendant's attitude about the case, etc. (*Id.* at 52). Healy would talk about the possibility of going to trial, the fact there is a right to call witnesses and that defendants cannot be made to testify (*Id.* at 52-53).

Healy also would have engaged in a negotiating process with Ron Coffee, the assistant district attorney

then present in the arraignment courtroom (*Id.* at 35, 41). In Healy's experience, the plea bargains offered by Coffee during arraignment were more advantageous to the defendants than the plea bargains offered at later stages of the proceedings. (*Id.* at 41).

After negotiating the plea bargain, Healy would discuss the matter with the defendant (*Id.* at 35). Healy then would fill out the advisement of rights form (*Id.* at 36-37). She would discuss the defendant's rights with him and explain it is very important that the defendant understand his rights (*Id.* at 42-43). She would explain that the advisement of rights form is a statement of constitutional rights that defendants give up when they enter a plea of guilty to a felony (*Id.* at 37). She would tell the defendant that he needs to read the form and initial the boxes if he understands and waives his rights (*Id.* at 37). She would explain the "defendant's statement" part of the form that says that the defendant is willingly pleading guilty (*Id.* at 37) After the form is filled out entirely, Healy would ask the defendant if he has any questions about his rights or anything else on the form (*Id.* at 37-38). Healy does not read the form to the defendants (unless the defendants indicate they are illiterate) (*Id.* at 38, 51-52). Healy signed an attorney statement on the advisement of rights form, expressing her confidence Petitioner understand his constitutional rights and the consequences of his guilty plea (Mem., Ex. B at 16, Ex. E at 45-46).

At the conclusion of the evidentiary hearing. Judge Thierbach found that Petitioner was capable of understanding and did understand the nature of the charges, Petitioner's constitutional rights and the consequences of pleading guilty (Mem., Ex. E at 94-97). Judge Thierbach

found Healy "fully made it clear" to Petitioner "that the consequences of him being convicted could be a sentence of life plus 17 years" and that Healy "did discuss with [Petitioner] the concept of trial, what would happen at trial" (*Id.* at 96). According to Judge Thierbach, Petitioner's indication prior to arraignment that he wanted to reach some sort of plea bargain suggested "that he knew darn well what was going on" (*Id.* at 95). Judge Thierbach emphasized Petitioner had been to court on numerous prior occasions and had his rights explained to him numerous times (*Id.* at 95-96). Judge Thierbach found that, once Petitioner got to prison following sentencing, he merely "decided he didn't like the deal he got" in connection with his plea (*Id.* at 94).

Although the evidence arguably could have yielded a different conclusion, Judge Thierbach's conclusion was not "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Nor was his conclusion "contrary to, or involve [ ] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Id.* At the time of his plea, Petitioner stated he understood his rights. "Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977). Although Healy may not have read the rights form to Petitioner, her testimony in other respects supported a finding of a knowing and voluntary plea. *Cf. Henderson v. Morgan*, 426 U.S. 637, 647 (1976) ("it may be appropriate to presume that in most cases defense counsel routinely explained the nature of the offense in sufficient detail to give the accused notice of what he is being asked to

admit"). Finally, Judge Thierbach properly considered the relevance of prior occasions on which Petitioner's constitutional rights had been explained to him. *See Parke v. Raley,* 506 U.S. 20, 36 (1992) ("a defendant's prior experience with the criminal justice system [is] relevant to the question whether he knowingly waived constitutional rights . . . "); *United States v. Dawson,* 193 F.3d 1107, 1110-11 (9th Cir. 1999), *cert. denied,* 121 S. Ct. 155 (2000) (where judge taking guilty plea failed to inform defendant of his right to confront and cross-examine witnesses and his privilege against self-incrimination, the defendant's experiences in prior criminal cases supported the conclusion that the defendant knowingly and voluntarily waived his constitutional rights at the time of his plea).

II. Claim of Ineffective Assistance of Counsel

Petitioner alleges he was denied the affective assistance of counsel. Petitioner principally complains of counsel's alleged failure to investigate or discuss with Petitioner the possibility of utilizing a defense of intoxication.

To establish ineffective assistance of counsel, Petitioner must prove: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington,* 466 U.S. 668, 688, 694, 697 (1984) ("Strickland"). The Court may reject the claim upon finding either that counsel's performance was reasonable or the claimed error was not prejudicial. *Strickland,* 466 U.S. at 697; *Thomas v. Borg,* 159 F.3d 1147, 1151 (9th Cir. 1998),

cert. denied, 526 U.S. 1055 (1999) ("We need not evaluate both prongs of the *Strickland* test if the defendant fails to establish one"). To prove prejudice, a defendant who pleaded guilty must establish "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty . . . " *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Review of counsel's performance is "highly deferental" and there is a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment. *United States v. Quintero-Barraza*, 78 F.3d 1344, 1348 (9th Cir. 1995), *cert. denied*, 519 U.S. 848 (1996); *see Strickland*, 466 U.S. at 689 ("a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"). The Court must judge the reasonableness of counsel's conduct "on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. The test is "only whether some reasonable lawyer . . . could have acted, in the circumstances, as defense counsel acted." *Coleman v. Calderon*, 150 F.3d 1105, 1113 (9th Cir.), *rev'd on other grounds*, 525 U.S. 141 (1998) (citations and internal quotations omitted); *see also Babbitt v. Calderon*, 151 F.3d 1170, 1173-74 (9th Cir. 1998), *cert. denied*, 525 U.S. 1159 (1999) (relevant inquiry under *Strickland* is not what defense counsel could have pursued, but rather whether the choices made by defense counsel were reasonable) (citation and quotations omitted).

The Court may "neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight." *Campbell v. Wood*, 18 F.3d 662, 673 (9th Cir.), *cert. denied*, 511 U.S. 1119 (1994). "In short, the defendant must

surmount the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *United States v. Quintero-Barraza*, 78 F.3d 1344, 1348 (9th Cir. 1995), *cert. denied*, 519 U.S. 848 (1996) (citation and internal quotations omitted); *Morris v. California*, 966 F.2d 448, 456-57 (9th Cir.), *cert. denied*, 506 U.S. 831 (1992) (if the court can conceive of a reasonable tactical reason for counsel's action or inaction, the court need not determine the actual explanation).

Petitioner has failed to prove counsel's conduct was unreasonable. Under the circumstances presented, an attorney reasonably could have recommended Petitioner accept the proffered plea bargain without further investigation or delay. *See generally Strickland*, 466 U.S. 69, 91 ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any effectiveness case, a particular decision not to investigate must be directly assessed for the reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments"). Petitioner faced a possible punishment of life plus 17 years for firing a shotgun at deputy sheriffs, both of whom were prepared to testify against Petitioner. In Healy's experience, the most advantageous plea bargain would be that offered at arraignment. The suggested intoxication defense, if proven, could have negated the specific intent element of the attempted murder charge. However, intoxication provided no such defense to related, general intent offenses. Those offenses included the already charged violations of Penal Code sections 246 and 12021, and the potentially chargeable violations of sections 245(a)(2), 245(d) and 12022.5(a). These general

intent charges could have resulted in a sentence *exceeding* the 13 years Petitioner received under the plea agreement.[5] Under these circumstances, the alleged failure further to investigate an intoxication defense or to discuss the matter with Petitioner should not be considered to have fallen outside "the wide range of reasonable professional assistance." *See Panuccio v. Kelly*, 927 F.2d 106, 109-10 (2nd Cir. 1991) (counsel's failure further to investigate or discuss possible intoxication defense not unreasonable where defense could have provided only an insubstantial reduction in prison time relative to the time received under the plea); *see also United States v. Sims*, 822 F. Supp. 1308, 1315 (N.D. Ill. 1993) ("there is no legal requirement that [the defendant] be informed of all possible defenses prior to pleading guilty").[6]

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[5] In disputing whether Petitioner would have been assessed the upper term for these offenses rather than the low or mid-term, Petitioner characterizes himself as a "first-time felon" (Traverse at 10). In fact, Petitioner had been convicted of at least one prior felony, for assaulting his mother (Mem., Ex. F at 106-25).

[6] The Petition also mentions an alleged failure to investigate an unnamed witness (Petition at 7) ("the police reports also showed that another witness said that Petitioner did not fire at the officers"). In apparent contradiction to this statement, however, Petitioner alleged in a petition filed in state court that the Sheriff's investigators did *not* interview non-law enforcement witnesses and "official statements about the shooting itself come only from the two deputies involved" (Motion to Dismiss, etc., filed February 20, 2001 at 117-18). In any event, Petitioner has failed to furnish proof, as distinguished from conclusory allegation, that any such alleged failure to investigate was unreasonable or prejudicial. *See Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995), *cert. denied*, 517 U.S. 1143 (1996); *see also Ceja v. Stewart*, 97 F.3d 1246, 1255 (9th Cir.

Petitioner also has failed to prove prejudice. On the present record, it does not appear that further investigation would have changed counsel's recommendation or Petitioner's decision to accept the 13-year deal rather than hazard a trial while facing a life sentence. Petitioner expressed his desire to negotiate a plea bargain even before the arraignment. The intoxication defense, even if successful, would have left Petitioner potentially exposed to a longer sentence than that available under the plea agreement. Consequently, it seem highly improbable further investigation or discussion with Petitioner would have resulted in rejection of the plea bargain. *See Creech v. Arave*, 947 F.2d 873, 879 (9th Cir. 1991), *rev'd in part on other grounds*, 507 U.S. 463 (1993); *Ames v. New York State Division of Parole*, 772 F.2d 13, 16 (2nd Cir. 1985), *cert. denied*, 475 U.S. 1066 (1986); *see generally United States v. Freeny*, 841 F.2d 1000, 1002 (9th Cir. 1988).

RECOMMENDATION

For the reasons discussed above, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying and dismissing the Petition with prejudice.

1996), *cert. denied*, 522 U.S. 971 (1997); *James v. Borg*, 24 F.3d 20, 26 (9th Cir.), *cert. denied*, 513 U.S. 935 (1994).

DATED: June 5, 2001.

/s/ Charles F. Eick
CHARLES F. EICK
UNITED STATES
MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSEPH GABRIEL CASTELLO, Petitioner, v. WILLIAM DUNCAN, Warden, Respondent.	NO. ED CV 01-0047-VAP(E) JUDGMENT (Filed June 21, 2001)

Pursuant to the Order Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied and dismissed with prejudice.

DATED: June 21, 2001.

/s/ Virginia A. Phillips
VIRGINIA A. PHILLIPS
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSEPH GABRIEL CASTELLO, Petitioner, v. WILLIAM DUNCAN, Warden, Respondent.	NO. ED CV 01-0047-VAP(E) ORDER DENYING CERTIFICATE OF APPEALABILITY (Filed July 12, 2001)

The Court has reviewed the Report and Recommendation of United States Magistrate Judge and the other papers on record in these proceedings. For the reasons set forth in the Magistrate Judge's Revised Report and Recommendation, filed June 5, 2001, the Court finds that the Petitioner has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253; Fed. R. App. P. 22b; *see also Lozada v. Deeds*, 498 U.S. 430 (1991); *Gardner v. Pogue*, 558 F.2d 548, 550 (9th Cir. 1977).

IT IS ORDERED that the Certificate of Appealability is denied.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, by United States mail, on Petitioner and on counsel for Respondent.

DATED: July 21, 2001.

/s/ Virginia A. Phillips
VIRGINIA A. PHILLIPS
UNITED STATES
DISTRICT JUDGE

PRESENTED this 11th day of
July, 2001, by:

/s/ Charles F. Eick
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

Advisement of Rights Form

SUPERIOR/MUNICIPAL COURTS
FOR THE COUNTY OF RIVERSIDE

People v. Joseph Castello

CR 70261

ADVISEMENT OF RIGHTS:

J.C. 1. I have the right to a speedy and public trial by a judge or jury.

J.C. 2. At my trial, I have the right to face and cross examine any witnesses against me.

J.C. 3. I have the right to ask the court to compel witnesses to attend my trial at no expense to me.

J.C. 4. I have the right against self-incrimination. I cannot be forced to testify against myself, but I also have the right to testify in my own defense if I choose to do so.

J.C. 5. I have the right to be represented by a lawyer throughout any trial. If I cannot afford one, the court will appoint one to represent me at no cost to me.

J.C. 6. *I understand that when I enter a plea of guilty, I waive, or give up each of the rights as stated above.*

CONSEQUENCES OF PLEA:

In addition to the consequences discussed in open court, and on page two of this form, I am further aware that my guilty plea to a felony will have the following consequences:

1. As a convicted felon, I will not be able to own or possess any firearm.

2. I will be ordered to pay a restitution fine of at least $200 and not more than $10,000.

3. Should I receive a prison term, I will be required to complete a period of parole supervision after completing the term. The maximum period of Parole may be up to 48 months. Should I violate any of the terms of parole, I could be returned to prison for said violation for up to one year per violation.

4. If I am not a citizen of the United States, I understand that this conviction may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

[Open Court Advisement /s/ JM]

___ *I have read and understand each of the above listed consequences.*

DEFENDANT'S STATEMENT:

The initials that appear above and on the back of this form are my own. I have read and understand each statement that I have initiated.

Date: 8-28-96 Signature: /s/ Joe Castello

ATTORNEY STATEMENT:

I am the attorney for the above named defendant. I am satisfied that 1) the defendant understands his/her constitutional rights and understands that a guilty plea would be a waiver of these rights; 2) that the defendant has had an adequate opportunity to discuss his/her case with me, including any defense he/she may have to the charges; 3) that the defendant understands the consequences of his/her guilty plea. Furthermore, I join in the

decision of the defendant to enter a guilty plea at this time.

Date: 8-28-96 Signature: /s/ T. Healy

INTERPRETER'S STATEMENT:

Having been duly sworn, I have truly translated this form to the defendant in the _____ language. The defendant has stated that he/she fully understood the contents of the form prior to signing.

Printed Name: _____ Signature: _____

THE CONSOLIDATED SUPERIOR/MUNICIPAL
COURTS OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE, WESTERN BRANCH

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff,	)	
vs.	)	CASE NO. CR70261
JOSEPH GABRIEL CASTELLO,	)	
Defendant.	)	

REPORTER'S TRANSCRIPT AT SENTENCING

BEFORE THE HONORABLE JANICE MCINTYRE,
JUDGE PRESIDING

DEPARTMENT NO. 44

WEDNESDAY, AUGUST 28, 1996

* * *

[1] RIVERSIDE, CALIFORNIA, WEDNESDAY,
AUGUST 28, 1996

MS. HEALY: You have been given the paperwork for disposition on Joseph Castello.

THE COURT: Mr. Castello. Sir, did you have an opportunity to look over a form that has your rights on it?

THE DEFENDANT: Yes.

THE COURT: Are those your initials and signature that appear on the form?

THE DEFENDANT: Yes.

THE COURT: Do you understand your rights?

THE DEFENDANT: Yes.

THE COURT: Do you also understand the consequences of your guilty plea to a felony that were listed in the middle part of the form?

THE DEFENDANT: Yes.

THE COURT: And it appears that you wish to plead guilty to Count I; is that correct?

THE DEFENDANT: Yes.

THE COURT: And you're also admitting the allegation pursuant to Penal Code Section 12022.5(a); is that correct?

THE DEFENDANT: Yes.

THE COURT: Do you understand the maximum punishment you could receive for that offense is 19 years in the state prison?

THE DEFENDANT: Yes.

THE COURT: It's been agreed probation would be denied, and you would serve 13 years in the state prison, less [2] any credit?

THE DEFENDANT: Yes.

THE COURT: Has anything else been promised to you?

THE DEFENDANT: No.

THE COURT: Has anyone threatened you or anyone close to you to force you to change your plea?

THE DEFENDANT: No.

THE COURT: At this time, are you giving up your rights in order to enter your guilty plea?

THE DEFENDANT: Yes.

THE COURT: All right. To a violation, to an attempt violation of Penal Code 187 as charged in Count I, how do you plead, sir?

THE DEFENDANT: Guilty.

THE COURT: And to the allegation pursuant to Penal Code Section 12022.5, that you used a firearm in the commission of that offense, are you admitting that or denying that?

THE DEFENDANT: Admitting it.

THE COURT: And are you pleading guilty to Count I, as well as admitting the allegation of being – of using a firearm because you want to plead guilty to the offense?

THE DEFENDANT: Yes.

THE COURT: Court finds a factual basis.

You've worked out a disposition with the District Attorney's Office, and you want to go ahead and be sentenced on that right away?

THE DEFENDANT: Yes, and forthwith.

THE COURT: Any legal reason why judge should not be [3] pronounced?

MS. HEALY: No, your honor. Waive formal arraignment. Submit on the dispo.

MR. COFFEE: Submit, your Honor.

THE COURT: Anything you'd like to say, sir, before I sentence you?

THE DEFENDANT: No.

THE COURT: As to Count I, probation is denied and you're sentenced to the state prison for the upper term of nine years.

As to the allegation alleged under Count I, you're sentenced to the state prison for the midterm of four years consecutive to the nine years of state prison, total 13 years in state prison with credit for 51 days – 44 plus seven days of 2933.1 time.

Further ordered to pay a restitution fine in the amount of $200, and Counts II and III are dismissed.

I also have a Hemet misdemeanor?

MR. COFFEE: People dismiss that, your Honor.

THE COURT: All right.

(Whereupon, proceedings were concluded.)

DECLARATION OF JAMES DIRKS

I, James Dirks, am an attorney licensed to practice in California. I represent Petitioner Joe Castello in his application for a writ of habeas corpus. If called to testify in this matter. I would state the following on my information and belief.

In preparation for my representation of Joe Castello, I obtained a copy of his CDC central file from Pleasant Valley State Prison. Among the hundreds of documents in the file. I found documents dealing with Joe's literacy level and intelligence test results. Following this declaration you will see the result of a CDC administered TABE reading test "chrono", dated "2 98", it shows a reading score of 0.0. The literacy score of zero is self-explanatory. It backs up the claim of illiteracy Joe makes in his declaration.

My correspondence with Joe's trial lawyer, Riverside County Deputy Public Defender Toni Healy, indicates that she was not aware of his inability to read. Had she been aware of that, she would have brought that fact to the court's attention as she has done in the past with known illiterate clients.

My inquiry to Attorney Healy asked for the contents of Joe's file at the Riverside Public Defender's office. Ms. Healy responded that she had already provided the full contents of her office's file to Joe Castello on his earlier request. That file contained court documents, a preliminary hearing transcript and some police reports. It contained no evidence of an independent investigation of the case by the Public Defender's office. No witnesses to the

alleged crime were contacted. The only documents discussing the facts of the case were the reports from the Riverside County Sheriff investigators.

From the contents of the file. Ms. Healy's representation and statements from witnesses to the alleged crime. I must conclude that the Public Defender conducted no independent investigation of the case. The Public Defender contacted no witnesses [sic] the facts of the case. The lawyers working on Joe's case must have exclusively relied on the statements and reports in the discovery provided by the District's Attorney.

As we investigated the circumstances of this case and located and interviewed witnesses to the incident, we learned that no one had ever spoken to these witnesses. No one from either the police or the defense ever bothered to contact the people who say the event which spawned this case.

Also attached to this declaration, you will find the result of a CDC administered *Raven Progressive Matrices I.Q. Test*. The CDC form 128M, dated "9-13-96", shows Joe Castello with a "Raven I.Q." score of 88, placing him in the 22nd percentile. I feel the I.Q. rating needs some explanation.

The document showing the I.Q. score bares [sic] the signature of Mary Maresh, Ph.D., a staff psychologist at CCL Tehachapi. I obtained the telephone number and called Dr. Maresh.

I asked her about the significance of a "Raven I.Q." score of 88 in the 22nd percentile. She explained that the Raven Progressive Matrices I.Q. test is a visual spatial

test. The test is quite neutral because it does not require literacy and contains no language-based cultural biases. It is a problem solving test involving identifying missing parts of patterns. In a given population the average raw score is calibrated to represent an IQ of 100. A person scoring 100 would be considered of average intelligence.

I did not ask Dr. Maresh about Joe Castello specifically. She tested him in 1996 and certainly would not remember him. I did ask her how she would rate a person scoring 88 on the Raven scale, as did Joe.

Dr. Maresh said that a person scoring 88 would be considered below average intelligence. She elaborated by explaining that anyone scoring 70 or below would be considered developmentally disabled. An 88 falls somewhere between disabled and average. She added that these scores contain a 3 to 5% a standard deviation.

She could not explain the significance of the 22nd percentile classification because she did not know in what context the score was rated. She did not have a hand in that part of the testing procedure.

Having obtained this explanation, I concluded my interview with Dr. Maresh.

It is also noteworthy that Joe's educational level is rated on that same form. The evaluators place him at a 2.1 grade level.

As part of my review of this case. I obtained some of Joe's medical records from his post-arrest hospitalization. Among the records is the report of a cranial CT scan. The report also follows this declaration Joe's physicians performed the scan looking for abnormalities following Joe's

trauma related fever. The scan did not find the abnormality for which it was ordered, but it did find that Joe has "mild cerebral atrophy". Cerebral atrophy can commonly be found in life-long alcoholics.

I declare under penalty of perjury that the foregoing is true and complete to the best of my knowledge and recollection. This declaration was executed on 30 November 1998 in Sacramento, California.

/s/ James Dirks
James Dirks.

DECLARATION OF JOSEPH CASTELLO

I, Joe Costello, am the Petitioner in this application for a writ of habeas corpus. If called to testify in this matter. I would state the following based on my personal knowledge, recollection and what I have learned and now believe.

I am now in prison at the Pleasant Valley State Prison in Coalinga. I came to prison after pleading guilty to attempted murder. I got a 13 years sentence at 80%.

Back in June of 1996 I was 31 years-old. I lived on the Soboba Reservation outside of San Jacinto in Riverside County. I belong to the Soboba tribe.

At that time I did not have a job. I have never worked. I did go to school on and off until the ninth grade. Even though I did go to school. I never managed to learn to read or write. Since coming to prison. I have reached a reading level of 2.6 and will improve on that in the future.

I admit that I am an alcoholic. I have been an alcoholic since I was very young, probably about 14. Some members of my close family are also alcoholics. My drinking got me into the trouble that put me in prison.

I was arrested on June 9, 1996. I know was drinking pretty heavy that day. I remember sleeping off the previous day's drinking at my cousin Sarah's house in San Jacinto. Sarah, my other cousin Larry and a friend, John and I had breakfast about 10:00 that morning at the Sizzlers in town. I think I had a couple of beers with my breakfast. After breakfast I picked up a couple of quarts of King Cobra Malt Liquor.

My companions and I then went to our cousin Michelle's house on the "rez" (Soboba Reservation) to pick up some drinking money. We moved on to my friend Nick's house where we stayed a while. At Nick's I think I drank a half-pint of tequila.

I think we left Nick's around noon and drove back into San Jacinto. At Donnell's Liquor I believe I bought a fifth of tequila and a 12-pack of Budweiser. Our next stop was my cousin's Aunt Winona's house. There I drank most of the beer and tequila. About that time I was seriously drunk. Cousin Sarah, who does not drink, got mad at me and would not give me a ride home because I was getting too drunk. So I got mad and started to walk home.

I walked as far a Garcia's Mini Mart. There I bought another 12-pack and ran into a friend. Dingas. Dingas offered to give me ride to my Dad's house on the rez. Dingas dropped me at my Dad's place and went on to work.

I had borrowed some money from my Dad earlier. I left my .410 bolt action shotgun with my Dad as collateral for a small loan a few days before. I paid my Dad back what I owed and took my gun, its case and a box of birdshot shells. I left my Dad's place and walked over to Cousin Mark's, a few houses from my Dad.

At Mark's I'm sure I had more to drink. Mark and I took the gun outside and shot at some cans we put on a fence post. After emptying the gun we went back inside. I re-loaded the gun and drank some more. I was starting to feel like I was going to pass out. So I thought I had better head for my place to sleep it off.

I walked home along Castile Canyon Road. I saw some cans on the side of the road and took some shots at them. Feeling kind of sick, I stopped and started for home again. I really don't remember much of what happened after that.

I probably took a shortcut near the intersection of Castille Canyon and Soboba Roads to get to my place. I have traveled that route before.

I can't remember the confrontation I am told I had with the police on the hill leading up to my house. I'm sure I felt sick and drunk and just wanted to pass out on my bed and sleep it off.

I know can get ugly when I'm drunk. I have been told that I fired off my gun while the cops were there. I find that hard to believe. I know better than to shoot toward any person. It would be really stupid to shoot off a gun when cops are around. I do not believe I fired my gun that day after the time I left Mark's house.

I don't remember being shot or falling down, I probably passed out for good when I got shot. I am told that I remained unconscious in the hospital for 33 days.

When I woke up in the hospital more than a month later, someone told me that I was charged with attempted murder. I could not believe that I did not remember doing anything to anyone. I was told that I would was going to prison. I was confused and very much afraid.

I did go to court with a lawyer representing me. I listened to what he had to say for a short time before a hearing, but I don't remember much about it. At the hearing the cops told a judge what they thought I did.

The judge believed that I had tried to kill a cop. I believed it was over for me right then.

I went back to the jail for a few days. Then I got another lawyer, a woman. I only remember spending about five minutes with her. Neither of the lawyers who were supposed to represent me talked to me about what happened that day. They did not ask me about my drinking habit. As far as I know they were going on what the police said I did. Neither of the lawyers mentioned that anyone else saw what happened, or that it did not really happen as the police said.

My second lawyer just told me I should plead guilty to a 13 year deal. I think she told me I would face a lot worse if I did not cooperate, possibly a life sentence. That is all she told me I could expect, I figured I had better do as she said. I was confused and scared, I had to rely on what my lawyer said. She gave me a form to read and sign, I wrote my name in the places where she said I should.

I did not tell my lawyer that I could not read the form. I was embarrassed about being a 31 year-old man who could not read and could barely write his own name. I have no idea what that form said. I know now that I was giving up some rights, I can't say what those were or what they meant. When we went into court I did and said what my lawyer told me to do and say. When the judge asked me questions, I answered as I was told to answer.

Since coming to prison, talking to my friends here and to a lawyer. I learned that the case against me for attempted murder just is not there. I learned that I should have been told that I could have had a trial where what

really happened could have been shown. I did not know that other tribe members saw what really happened to me and could have been called as my witnesses to show the police lied about what I did. I learned that I had certain rights that I did not use. I should have appealed what happened in court, but no one told me that I could do that.

When I got to prison a jailhouse lawyer told me my sentence was wrong. He filed a writ for me on that point. It was denied. At that time I had no idea of the problems with this conviction and the representation I had.

I declare under penalty of perjury that the foregoing is true and complete to the best of my knowledge, recollection, information and belief. This declaration was executed on 16 November 1998 in Fresno County, California.

/s/ Joseph Castello
Joseph Castello

WITNESS

I, MARK VERBA, am over the age of eighteen and can read, write and understand the English Language. I have gone over this declaration in detail with Joe Castello. I am confident that he understands and agrees with the contents of the declaration and has no material alterations to offer. I am well acquainted with Joe and often help him with his correspondence. I assisted Joe Castello with reading this declaration on 16 November 1998 at Pleasant Valley State Prison.

/s/ Mark Verba
Mark Verba.